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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

TODD HENRY JARVIS, et al. Plaintiffs and Respondents, v. WENDEL, ROSEN, BLACK & DEAN, LLP, et al., Defendants and Appellants.	A151981 (Alameda County Super. Ct. No. RG16827566)

Todd Henry Jarvis (Todd or plaintiffs) sued the law firm Wendel, Rosen, Black & Dean, LLP (Wendel Rosen) and attorney Les Hausrath (together defendants) for professional negligence, breach of fiduciary duty, and other claims based on allegations that Todd hired Wendel Rosen to represent him in various capacities and that defendants later breached duties owed to him by, among other things, "taking adverse actions to [his] detriment," "failing to withdraw from a conflicted representation," and "disclosing confidential information."[1]

[1] We refer to Todd Henry Jarvis, the individual, by his first name for clarity and brevity because we also discuss his brother who shares his last name. Also, following the practice of the parties and the trial court, we refer to the party (or parties) who brought suit in the plural as "plaintiffs." (Below, the trial court referred to Todd acting as an individual, Todd as trustee, and Todd as general partner as "Plaintiffs" (rather than a single plaintiff) and defendants referred to "Plaintiffs" in their anti-SLAPP motion; on appeal, Todd has filed briefs on behalf of "Respondents."

Defendants filed an anti-SLAPP motion to strike the complaint on the grounds that (1) Wendel Rosen ceased representing Todd in 2004, and (2) plaintiffs' claims arose from alleged conduct that all related to defendants' legal representation of another client from 2009 to around 2015, and since the alleged conduct furthered defendants' and their client's rights of petition, it was protected activity under Code of Civil Procedure section 425.16, subdivision (b)(1) (§ 425.16(b)(1)).[2] The trial court denied the motion under the first step of the anti-SLAPP analysis, finding the claims arose not from protected litigation activities, but rather from breaches of professional and ethical duties allegedly owed to plaintiffs as clients or former clients of defendants.

On appeal, defendants contend the trial court erred in the first step of the anti-SLAPP analysis. We affirm.[3]

FACTUAL AND PROCEDURAL BACKGROUND

On August 16, 2016, plaintiffs initiated this action by filing his original complaint, which was never served. On November 30, 2016, plaintiffs filed a first amended complaint (FAC), the operative complaint, which was served on defendants on December 8, 2016.

First Amended Complaint

Parties, Real Property, Trusts, and a Partnership

According to the FAC, Todd and his brother Jim Jarvis (Jim) were equitable owners of three adjacent pieces of real property in Monterey County: (1) the Jarvis ranch, which a buyer expressed interest in buying "for millions of dollars," (2) a 1.1 acre rental property owned by Todd and Jim as tenants in common, referred to as the "TIC

[2] Code of Civil Procedure section 425.16, known as the anti-SLAPP statute, "provides for early dismissal of certain actions known as 'strategic lawsuits against public participation.' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).) "The purpose of anti-SLAPP motions is to weed out lawsuits designed to stifle free speech or lawful expressive conduct." (*Yeager v. Holt* (2018) 23 Cal.App.5th 450, 456 (*Yeager*).)

[3] Plaintiffs have filed a motion to dismiss the appeal as frivolous, which we deny. Defendants have filed a motion for judicial notice, which we also deny.

property," and (3) the "LP property," a third property owned by Jarvis Properties, LP (Jarvis LP), a limited partnership, of which Todd was a general partner.[4]

The Jarvis ranch was held in the Jarvis Administrative Trust (Ad Trust). Todd was the trustee of the Ad Trust, and Todd and Jim were the intended beneficiaries.[5] At some point, Todd and Jim agreed to the formation of the Jarvis Family Replacement Trust (Replacement Trust), which received and held the Jarvis ranch and the TIC property. The Replacement Trust had a third-party trustee (Replacement Trustee), and Todd remained an intended beneficiary of the new trust and an equitable owner of the trust properties. The LP property remained an asset of Jarvis LP.

General Allegations

Plaintiffs alleged Todd retained Wendel Rosen on or about September 24, 2003, and Wendel Rosen "advised and represented Todd on a variety of legal matters." During that representation, Wendel Rosen "became intimately involved with the administration of the Ad Trust and Todd's intentions, mental impressions, strategy, and goals in that administration."

When the Replacement Trust was formed, Wendel Rosen "undertook to represent the Replacement Trust" and Todd's "and Jim's equitable and beneficial interest in the" Jarvis ranch. At no time did Wendel Rosen disclose to or advise Todd of any potential or actual conflicts among plaintiffs, the Ad Trust, the Replacement Trust, or the Replacement Trustee. "After Wendel Rosen began representing the Replacement Trustee, the Replacement Trustee became increasingly adverse to Todd, and took actions that disadvantaged Todd and Jarvis LP, and conflicted with the purpose and intent of the Replacement Trust."

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[4] The FAC did not specify the size of the Jarvis ranch, but in a declaration, Todd described it as an approximately 333-acre row crop farm located along Highway 101 across from the City of Salinas. In the same declaration, Todd described the LP property as a 2-acre parcel of unimproved land.

[5] Specifically, plaintiffs alleged the Ad Trust "was formed and intended to hold property and ultimately distribute its assets equally between the two brothers, with a small cut-out from Jim's portion for the benefit of his children."

An "important event" for purposes of plaintiffs' action against defendants was a "CalTrans freeway project," which resulted in an eminent domain lawsuit involving the three Jarvis properties. In December 2012, Wendel Rosen began representing "the Replacement Trust, Jarvis LP, and Todd and Jim individually as the owners of the three affected properties" in the eminent domain lawsuit. As to the LP property, plaintiffs alleged Wendel Rosen owed Todd a fiduciary duty as general partner and authorized agent of Jarvis LP.

Plaintiffs alleged Wendel Rosen "continued to regularly engage and advise Todd regarding various legal matters relating to the eminent domain action, including . . . seeking and obtaining considerable confidential information from Todd; . . . providing Todd with attorney client updates relating to the joint representation, . . . providing legal advice and legal analysis responsive to Todd's questions relating to the various legal issues and litigated matters; . . . conferring with Todd regarding various proposed actions concerning various legal issues."

Causes of Action

Plaintiffs alleged seven causes of action styled as follows: (1) professional negligence, (2) breach of fiduciary duty, (3) unlawful business practices, (4) breach of contract, (5) professional negligence, (6) breach of fiduciary duty, and (7) unfair business practice, with the first four claims asserted by Todd and the last three claims asserted by "Jarvis LP and its general partner."

Motion to Strike

On February 6, 2017, defendants filed an anti-SLAPP motion. Defendants argued the alleged conduct arose from their legal representation of John McDonnell, the Replacement Trustee, in eminent domain lawsuits in the Monterey County Superior Court from 2009 to approximately 2015, "all of which constituted activities in furtherance of the rights of the Attorney Defendants and their client to petition . . . ." Defendants filed supporting declarations by Hausrath (a defendant in the FAC) and McDonnell (not a defendant).

In his declaration, Hausrath, a partner at Wendel Rosen, stated the following. Wendel Rosen and attorney Bruce Lymburn began representing Todd as the trustee of the Ad Trust in connection with the potential development of the Jarvis ranch in September 2003. In June 2004 (after the Replacement Trust was created and McDonnell was appointed the Replacement Trustee), McDonnell asked Wendel Rosen to represent him "in the same matter for which it had been previously retained by Todd Jarvis, as Trustee for the [Ad] Trust, i.e., the potential development of the Jarvis Ranch." Todd voiced no objection to McDonnell retaining Wendel Rosen.

McDonnell asked Wendel Rosen to represent him as trustee of the Replacement Trust in the Caltrans matter in 2005. Hausrath sometimes provided Todd and Jim updates on the proposed Caltrans acquisition, but "at no time after June 2004 did Wendel Rosen represent Todd Jarvis in any capacity, or take or ask for any instruction from [him]." Hausrath was unaware of any confidential information obtained from Todd before June 2004. Hausrath represented McDonnell in his capacity as the Replacement Trustee in the eminent domain lawsuits, which Caltrans filed in May 2009.[6] Todd retained separate counsel to represent his interests in the eminent domain lawsuits, but he never moved to disqualify Wendel Rosen.[7] Eventually, in 2015, McDonnell negotiated

[6] Caltrans filed three eminent domain lawsuits, one for each of the three Jarvis properties. For the lawsuits related to the Jarvis ranch and the TIC property, McDonnell in his capacity as trustee was the named defendant. In the lawsuit related to the LP property, Caltrans named Jarvis LP as the defendant.

[7] According to Hausrath, attorney Robin Calder appeared on behalf of Todd in the eminent domain lawsuits in the fall of 2009. From the beginning of her involvement, "Ms. Calder generally took an adversarial, if not hostile, stance in response to my and Mr. McDonnell's efforts to represent the interests of the Replacement Trust." Hausrath reached a "mutually beneficial settlement" with Caltrans in 2009, Todd objected to the settlement, the probate court granted McDonnell authority to execute contracts with Caltrans (effectively approving the settlement), and Todd appealed the probate court's decision. In addition, Todd intervened in the eminent domain lawsuits, accusing McDonnell of breaching his duties as trustee and accusing Hausrath of having a conflict of interest based on his wife's business. (Hausrath maintained there was no conflict of interest.) The trial court in the eminent domain lawsuits permitted Todd to intervene in April 2010, and then the eminent domain lawsuits were stayed for two and half years

the sale of the Jarvis ranch, "which resulted in Todd Jarvis receiving his share of the $17 million sales proceeds that the probate court determined was an appropriate sale amount."

Hausrath stated, "From and after June[] 2004, Todd Jarvis was not a client of Wendel Rosen, but rather was a beneficiary of the Replacement Trust which Wendel Rosen represented through Mr. McDonnell as Trustee. I understood that by its terms the [Ad] Trust was terminated when the new trust was created. As a former client of the firm, Todd Jarvis was never treated as a client thereafter. He was not billed for services. He was not asked to sign an engagement letter. Instead, in all matters related to the Jarvis Ranch, the TIC Property, and the LP Property in which Wendel Rosen was involved, he was represented by his own legal counsel . . . ."

McDonnell, an attorney, declared the following. Todd and Jim had disputes regarding administration of the Ad Trust and the brothers agreed it would be best if the assets were managed by an independent third party. Pursuant to a court order and the brothers' request, McDonnell was first appointed neutral trustee of the Ad Trust in March 2004. Then, as the result of a settlement agreement between Todd and Jim, the Replacement Trust was created in June 2004 to succeed the Ad Trust, and the probate court approved McDonnell's appointment as the trustee of the new trust.[8] McDonnell was unaware of and was not provided any confidential information obtained from Todd by Wendel Rosen.

Based on the declarations and attached exhibits, defendants argued, "the evidence establishes that in 2004, Wendel Rosen ceased representing Todd Jarvis, as the Trustee of the [Ad] Trust" and, thereafter, Todd "was never again a Wendel Rosen client." They

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pending resolution of Todd's appeal of the probate court's decision granting McDonnell authority to settle with Caltrans. In the appeal, the Sixth District reversed as moot the probate court's order authorizing McDonnell to settle with Caltrans.

[8] Title to the Jarvis ranch and to the TIC property were transferred to McDonnell as the trustee of the Replacement Trust. Management and control of the LP property was also transferred to McDonnell although title did not pass. He understood that Wendel Rosen's representation of Todd as the trustee of the Ad Trust ended upon the transfer of assets to the Replacement Trust.

asserted, "Because the Attorney Defendants ceased representing Plaintiff Todd Jarvis as of 2004 and thereafter did not represent [him] in any capacity in the eminent domain lawsuits, Plaintiffs cannot meet their burden of establishing that there is a probability that Plaintiffs will prevail on their professional negligence, breach of fiduciary duty, unlawful business practices, and breach of contract causes of action in this matter."

Plaintiffs opposed the motion, and Todd filed a 29-page declaration in support of the opposition. Among other things, Todd stated, "Wendel Rosen communicated with me as a client, treated me as a client, and led me to believe that my ownership interests and rights were being protected" (even after June 2004)[9] and, "I believe that from 2004 through September 8, 2015, Wendel Rosen represented me as a true owner, equitable owner, settl[o]r and intended beneficiary in the real property previously part of the [Ad] trust . . . ."

Trial Court's Decision

The trial court denied the motion to strike, finding defendants had failed to make the threshold showing that the claims arose from protected activity. The court explained, "After considering [the] allegations, as well as the admissible portions of the declarations submitted by the parties as to the conduct on which the causes of actions are based, the court determines that the causes of action, as pleaded, fall within the recognized exception" for legal malpractice. The court found that Todd was suing defendants, "not

[9] Todd declared that in August 2004, Wendel Rosen attorney Lymburn provided him legal analysis regarding the tax consequences of the transfer of the Jarvis ranch from the Ad Trust to the Replacement Trust. He stated, "Lymburn did not disclaim representation of me, individually, but expressly provided legal advice to me with respect to my ownership interest, and that my brother and I would remain the 'true owners' of the real property. McDonnell was plainly aware of that, as he was also part of these discussions, and the representations made." Todd maintained that he exchanged confidential communications with Wendel Rosen regarding the Jarvis ranch for many years, and Lymburn continued to advise him and request his suggestions regarding negotiations with developers. Todd stated that in 2007, he had "privileged communications regarding Caltrans" with Hausrath. And in 2008, Hausrath responded to Todd's inquires in an email with the subject line "Privileged Attorney Client Communication."

as a 'third party allegedly harmed by [Defendants'] representation of another client' but instead as Defendants' 'former client that allegedly was harmed as the result of [Defendants'] . . . "breaching the duty of loyalty" that was owed' to Todd," quoting *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 505 (*Loanvest*).

The court was not persuaded by defendants' arguments that they ceased representing Todd by 2004, that only McDonnell was their client from 2004 to 2015, and that Todd's status as a beneficiary of the Replacement Trust was not sufficient to create an ongoing attorney-client relationship or otherwise create professional duties owed to Todd. The court reasoned, "these arguments go to the merits of Todd's claims that Defendants continued to owe him professional duties of care, loyalty and confidence, despite their representation of the Trustee, rather than showing that Todd (and Jarvis LP) are suing Defendants for protected activity independent of breaches of such alleged (and disputed) duties."

DISCUSSION

A. *The Anti-SLAPP Statute and Standard of Review*

Section 425.16(b)(1), provides, "A cause of action against a person arising from any act of that person in furtherance of the person's *right of petition* or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Italics added.)

The anti-SLAPP protection for petitioning activity applies to litigation-related conduct (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537), and protected petitioning activity "includes qualifying acts committed by attorneys in representing clients in litigation" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056).

The California Supreme Court has summarized a trial "court's task in ruling on an anti-SLAPP motion to strike as follows. Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from

protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67 (*Equilon*).)

In the first step of the anti-SLAPP analysis, "[t]he sole inquiry . . . is whether the plaintiff's claims arise from protected speech or petitioning activity. [Citation.] Our focus is on the principal thrust or gravamen of the causes of action, i.e., the allegedly wrongful and injury-producing conduct that provides the foundation for the claims." (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490–491 (*Castleman*).) "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier, supra,* 29 Cal.4th at p. 89.) "We review the parties' pleadings, declarations, and other supporting documents at this stage of the analysis only 'to determine what conduct is actually being challenged, not to determine whether the conduct is actionable.' " (*Castleman, supra,* at p. 491.)

We review a trial court's order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326.)

B. *Conduct Constituting Legal Malpractice Generally is Not Protected*

"Although . . . an attorney's 'litigation-related activities' . . . constitute acts in furtherance of a person's right of petition, numerous cases have held that 'actions based on an attorney's breach of professional and ethical duties owed to a client' are generally

not subject to section 425.16 'even though protected litigation activity features prominently in the factual background.' " (*Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 151, italics added (*Sprengel*); see *Yeager*, *supra*, 23 Cal.App.5th at pp. 457–458 [citing cases].) For example, in *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, the plaintiffs were clients who sued their attorneys for negligently representing them in a civil lawsuit. (*Id*. at pp. 627–628.) The attorneys filed an anti-SLAPP motion to strike the plaintiffs' complaint, but the Court of Appeal concluded the defendants "failed to demonstrate that [the alleged] conduct amounts to constitutionally protected speech or petition," and "reject[ed] their attempt to turn garden-variety attorney malpractice into a constitutional right." (*Id*. at p. 632.)

More recently, Division Three of our court explained, "Where . . . a legal malpractice action is brought by an attorney's former client, claiming that the attorney breached fiduciary obligations to the client as the result of a conflict of interest or other deficiency in the representation of the client, the action does not threaten to chill the exercise of protected rights and the first prong of the anti-SLAPP analysis is not satisfied." (*Loanvest*, *supra*, 235 Cal.App.4th at p. 504.)

This well-recognized principle of anti-SLAPP analysis applies to attorneys' alleged breaches of the duties of loyalty and confidence owed to clients and former clients. (E.g., *Castleman*, *supra*, 216 Cal.App.4th at p. 493; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729–733 (*Freeman*); *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1181 (*Benasra*).)

In *Benasra*, three plaintiffs sued their former law firm for breach of the duty of loyalty in representing the plaintiffs' opponent in an arbitration. (*Benasra*, *supra*, 123 Cal.App.4th at p. 1182.) The defendant law firm filed an anti-SLAPP motion to strike and presented evidence that they no longer represented the plaintiffs at the time of the arbitration and that "there was no substantial relationship between the matters in which they formerly represented [plaintiffs] and the . . . arbitration." (*Ibid*.)

The Court of Appeal held the defendant law firm did not satisfy the first step of the anti-SLAPP analysis. The plaintiffs' claims were based on alleged violations of the

State Bar Rules of Professional Conduct, which, among other things, provide that an attorney shall not, without the informed written consent of each client, " '[a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict,' " and "that an attorney 'shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.' " (*Benasra, supra,* 123 Cal.App.4th at p. 1187, quoting State Bar Rules of Professional Conduct, rule 3-310(C) and (E).) The *Benasra* court agreed with the plaintiffs that "their claim [wa]s not based on 'filing a petition for arbitration on behalf of one client against another, but rather, for *failing to maintain loyalty to, and the confidences of, a client*.' " (*Benasra, supra,* 123 Cal.App.4th at p. 1189, italics added.) The court further explained, "[T]he actual disclosure of confidences by a former attorney during litigation is not required to form the basis for the tort of breach of duty of loyalty. *The breach occurs* not when the attorney steps into court to represent the new client, but *when he or she abandons the old client*." (*Ibid*., italics added.) Thus, the court concluded the plaintiffs' allegations did not fall within the ambit of the anti-SLAPP statute. (See *id.* at p. 1181.)

In *Freeman, supra,* 154 Cal.App.4th 719, two real estate agents sued their attorney Schack "for breach of contract, professional negligence and breach of fiduciary duty based on allegations that [the attorney] had entered into a contract by which he assumed attorney-client duties toward plaintiffs but abandoned them in order to represent adverse interests in the same and different litigation." The plaintiffs alleged Schack had been hired to represent them in an antitrust lawsuit against a listing service, but Schack then represented another plaintiff-in-intervention in the lawsuit and pursued a settlement adverse to the plaintiffs' interests. (*Id.* at pp. 722–725.) Schack filed an anti-SLAPP motion to strike the claims. The Court of Appeal, however, concluded Schack failed at the first step of the anti-SLAPP analysis because the plaintiffs' claims did not arise from protected petitioning activity. (*Id.* at p. 733.) The court reasoned, "[T]he principal thrust of the conduct underlying [the plaintiffs'] causes of action is not Schack's filing or

settlement of litigation," but rather "the 'activity that gives rise to [Schack's] asserted liability' [citation] is his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them . . . ." (*Id.* at p. 732.)

In *Castleman*, *supra*, 216 Cal.App.4th 481, the plaintiffs were Peter Castleman and certain limited liability companies. In 2007 and 2008, a law firm represented the plaintiffs in business ventures including real estate transactions between the plaintiffs and James Bratton. In 2009, an attorney at the law firm, Howard Sagaser, resigned from the firm after allegedly accessing the firm's confidential information about the plaintiffs. Sagaser allegedly provided this confidential information to Bratton, who initiated a lawsuit against the plaintiffs, claiming they conspired to defraud him in the real estate ventures. (*Id*. at pp. 485–487.)

The plaintiffs then filed a complaint against Sagaser, alleging " 'Sagaser used confidential information of the Plaintiffs that Sagaser had obtained in connection with his firm's representation of the Plaintiffs (1) to encourage Bratton to bring a meritless action against Plaintiffs . . .; (2) to draft a complaint for Bratton against the Plaintiffs; and (3) to represent, to advise and to assist Bratton in his action against the Plaintiffs.' " (*Castleman*, *supra*, 216 Cal.App.4th at p. 487.) Sagaser moved to strike the complaint under the anti-SLAPP statute. After reviewing cases including *Benasra* and *Freeman*, the Court of Appeal concluded, "[The plaintiffs'] causes of action do not arise from protected activity within the meaning of the anti-SLAPP statute. The foundation of each claim is the allegation that Sagaser chose to align himself with [the plaintiffs'] adversaries, in direct opposition to [the plaintiffs'] interests, thereby *breaching duties of loyalty and confidentiality owed to them by virtue of a prior attorney/client relationship*. [The plaintiffs'] complaint specifically alleges that Sagaser violated the State Bar Rules of Professional Conduct, including rule 3–310, which is the principal thrust of their lawsuit." (*Id*. at p. 493, italics added.)

C. *Plaintiffs' Allegations Did Not Arise From Protected Activity*

Here, plaintiffs alleged Todd hired Wendel Rosen to represent him in 2003, and after McDonnell hired the same firm, Wendel Rosen never advised Todd of any potential conflicts between him, the Replacement Trust, or McDonnell. He alleged McDonnell then "took actions that disadvantaged Todd and Jarvis LP." Plaintiffs alleged defendant Hausrath had a "material conflict . . . that favored CalTrans over plaintiffs" and Wendell Rosen failed to disclose the conflict. He alleged Wendel Rosen breached its professional duties owed to him by, among other things, "failing to adequately ensure that Todd's interests were adequately considered, protected, or provided for and by utilizing his confidential information to his detriment," "continuing to take adverse actions without any waivers from Todd," and "disclosing confidential information, withholding information and failing to release Todd's client files."[10]

Plaintiffs' allegations against defendants are akin to the allegations in *Benasra* that the defendant law firm " 'fail[ed] to maintain loyalty to, and the confidences of, a client,' " (123 Cal.App.4th at p. 1189), the allegations in *Freeman* that an attorney "undert[ook] to represent a party with interests adverse to [his clients], in violation of the duty of loyalty he assertedly owed them" (154 Cal.App.4th at p. 732), and the allegations in *Castleman* that an attorney " 'used confidential information . . . obtained in connection with his firm's representation of the Plaintiffs' " and "breache[d] . . . the duties of loyalty and confidentiality owed to [the plaintiffs] as former clients under the State Bar Rules of

[10] These allegations were made in plaintiffs' first cause of action for professional negligence. The other claims are similar. In the second cause of action for breach of fiduciary duty, plaintiffs alleged Wendel Rosen owed Todd duties of loyalty and confidentiality (among other duties) and Wendel Rosen breached its duties by failing to disclose the "actual material conflicts between . . . Hausrath and CalTrans," and in the third cause of action for unlawful business practices, plaintiffs alleged Wendel Rosen "failed to follow professional, legal, and ethical standards" and violated the State Bar Rules of Professional Conduct, rules 3-310, 3-500, and 3-700. In the fourth cause of action for breach of contract, plaintiffs alleged Todd and Wendel Rosen executed a written engagement agreement and Wendel Rosen breached the contract by failing to provide legal services in accordance with its ethical and professional duties. Plaintiffs' remaining three causes of action rely on similar allegations of wrongdoing by defendants against "Jarvis LP and its general partner."

Professional Conduct" (216 Cal.App.4th at pp. 487–488.) As we have seen in all these cases, such allegations of attorney misconduct do *not* constitute protected petitioning activity under the first step of the anti-SLAPP analysis. (*Benasra*, *supra*, at pp. 1181, 1189; *Freeman*, *supra*, at p. 733; *Castleman*, *supra*, at p. 493.) Following the reasoning of *Benasra*, *Freeman*, and *Castleman*, we conclude defendants in this case have failed to make a threshold showing that plaintiffs' claims arose from protected activity. Instead, the principle thrust or gravamen of their allegations is that defendants breached professional and ethical duties owed to them as either clients or former clients.

Defendants' arguments do not convince us otherwise. Defendants first assert they have conclusively negated the possibility of an attorney-client relationship between plaintiffs and defendants after June 2004. This argument is intended to refute plaintiffs' allegations that Todd continued to have an attorney-client relationship with defendants after June 2004 and through the filing of the eminent domain lawsuits.[11]

The trial court, however, was correct that this argument goes to the *merits* of plaintiffs' claims rather than the conduct being alleged. In the first step of the anti-SLAPP analysis, "[w]e review the parties' pleadings, declarations, and other supporting documents . . . *only 'to determine what conduct is actually being challenged*, not to determine whether the conduct is actionable.' " (*Castleman*, *supra*, 216 Cal.App.4th at p. 498, italics added.) "We do not consider the *veracity* of [the plaintiffs'] allegations in determining whether their claims arise from protected speech or petitioning activity." (*Id*. at p. 493, italics added; see *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371 ["The merits of [a plaintiff's] claims should play no part in the first step of the anti-SLAPP analysis"].)[12]

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[11] Specifically, plaintiffs alleged Wendel Rosen "remained counsel for the Jarvis LP and Todd, as a general partner, until at least November 6, 2015," "jointly represented the various parties [presumably including Todd] for over six years," and "continued to regularly engage and advise Todd regarding various legal matters relating to the eminent domain action."

[12] For example, in *Freeman*, the defendant Schack argued, based on the evidence, that there was no "possible breach of the duty of loyalty." (*Freeman*, *supra*, 154

The facts of *Sprengel, supra*, 241 Cal.App.4th 140 are illustrative. There, the plaintiff Jean Sprengel and a business partner were the sole co-owners of a limited liability corporation, Purposeful Press. After a dispute arose between the two co-owners, the business partner hired the defendant attorneys to represent Purposeful Press "related to the dispute with Sprengel." (*Id*. at p. 144.) Sprengel filed a complaint for involuntary dissolution against her business partner and Purposeful Press, and filed a separate action against the partner. The defendant attorneys represented Purposeful Press in the litigation and also pursued a claim against Sprengel. (*Id*. at p. 145.)

Sprengel then filed a malpractice action against the defendant attorneys alleging they violated the duty of loyalty they owed *to her* by pursuing her business partner's interests in the lawsuits Sprengel brought. (*Sprengel, supra*, 241 Cal.App.4th at p. 146.) The defendant attorneys filed an anti-SLAPP motion to strike Sprengel's complaint. (*Sprengel, supra*, 241 Cal.App.4th at p. 147.) The defendant attorneys argued the claims were all premised on the existence of an attorney-client relationship between Sprengel and the defendants, but Sprengel could not establish the existence of such a relationship. (*Ibid*.) The Court of Appeal rejected the defendants' argument, explaining, "Defendants' arguments regarding the absence of an attorney-client relationship with Sprengel improperly conflate the first and second prongs of the Section 425.16 test. 'The sole inquiry' under the first prong of the test is whether the plaintiff's claims arise from protected speech or petitioning activity. [Citation.] In making this determination, '*[w]e do not consider the veracity of [the plaintiff's] allegations*' [citation] nor do we consider '[m]erits based arguments.' [Citations.] If the defendant demonstrates the plaintiff's claims do arise from protected activity, we then review the potential merits of the plaintiff's claims in the second step of the analysis. [Citation.] However, '[w]here

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Cal.App.4th at pp. 732–733.) But this argument failed to establish the first step of the anti-SLAPP analysis. The court explained, "These *merits based arguments have no place in our threshold analysis* of whether plaintiffs' causes of action arise from protected activity. Where Schack cannot meet his threshold showing, the fact he 'might be able to otherwise prevail on the merits under the "probability" step is irrelevant.' " (*Id*. at p. 733, italics added.)

[defendant] cannot meet his threshold showing, the fact he might be able to otherwise prevail on the merits under the "probability" step is irrelevant.' [Citation.] *Whether Sprengel actually shared an attorney-client relationship with defendants relates to the merits of her claims and is therefore not relevant to our first prong analysis. Although defendants may ultimately defeat Sprengel's claims by proving the absence of an attorney-client relationship, that does not alter the substance of her claims*." (*Sprengel, supra,* 241 Cal.App.4th at pp. 156–157, italics added.)

Yeager, supra, 23 Cal.App.5th 450, is also helpful for our analysis. In that case, the plaintiffs sued defendants Peter Holt, the Holt Law Firm, and Bethany Holt for professional negligence, and in response, the defendants filed an anti-SLAPP motion with a supporting declaration stating that Bethany Holt had nothing to do with the defendant law firm. (*Id*. at pp. 454–455.) The court concluded the defendants' anti-SLAPP motion failed at the first step of the anti-SLAPP analysis because the allegations did not arise from protected activity. (*Id*. at pp. 456–457.) Alluding to defendants' evidence that Bethany Holt was not involved with the law firm that allegedly provided negligent legal services, the court observed, "Although there may be sound reasons why this case will not succeed, either in whole or in part, filing an anti-SLAPP motion was not an effective way to litigate it." (*Id*. at p. 461 and fn. 7.)

Turning to the present case, we do not decide the truth of plaintiffs' allegations that defendants continued to have an attorney-client relationship with plaintiffs after June 2004 in the first step of the anti-SLAPP analysis. Although defendants may ultimately defeat plaintiffs' claims by proving they have no merit, "filing an anti-SLAPP motion [i]s not an effective way to litigate" the claims. (*Yeager, supra,* 23 Cal.App.5th at p. 461.)

Defendants argue the facts of *Sprengel* are distinguishable because in the present case, defendants have conclusively negated the possibility of an attorney-client relationship with plaintiffs. They rely on an observation the *Sprengel* court made in a footnote that "based on the arguments and evidence presented in their briefs, [the] *defendants have not 'conclusively' negated the possibility of an attorney-client relationship* between themselves and Sprengel; it would therefore be improper to resolve

that issue under the first prong of the anti-SLAPP statute test." (*Sprengel, supra,* 241 Cal.App.4th at p. 157, fn. 7, italics added.) Yet, the *Sprengel* court rejected a similar argument. The *Sprengel* defendants claimed the undisputed evidence showed they were hired to represent only Purposeful Press, a limited liability company (LLC), and asserted an attorney for an LLC owes no professional duties to the LLC's individual members. But, the court explained, "[The] defendants have cited no authority holding that an attorney for an LLC has no obligations to the LLC's individual members. . . . [I]n the context of partnerships, . . . a five-part factual inquiry[13] is used to 'determine whether in a particular case the partnership attorney has established an attorney-client relationship with the individual partners.' [Citations.] . . . To the extent the partnership rules were found to apply, a factual inquiry would be necessary to determine what duties (if any) the defendants owed to the LLC's members, including Sprengel. Thus, based on the arguments and evidence presented in their briefs, defendants have not 'conclusively' negated the possibility of an attorney-client relationship between themselves and Sprengel; it would therefore be improper to resolve that issue under the first prong of the anti-SLAPP statute test." (*Sprengel, supra,* 241 Cal.App.4th at p. 157, fn. 7.)

Likewise, here, it would be improper in the first step of the anti-SLAPP analysis to decide the factual question whether an attorney-client relationship arose between

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[13] The "five-part factual inquiry" the *Sprengel* court referred to was first described in *Johnson v. Superior Court* (1995) 38 Cal.App.4th 463. (*Sprengel, supra,* 241 Cal.App.4th at p. 157, fn. 7.) The *Johnson* court identified the following five (nonexhaustive) factors to be considered in determining whether an attorney for a partnership has an attorney-client relationship with an individual partner: (1) the size of the partnership ("representation of a partnership of few members may suggest an individual representation of the members, while representation of a partnership with 'scores or even hundreds' of partners would not' "), (2) the nature and scope of the attorney's engagement, (3) the kind and extent of contacts between the attorney and the individual partners, (4) the attorney's access to financial information relating to the individual partner's interests, and (5) " '[P]rimary attention should be given to whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership attorney not to accept other representations adverse to the individual partner's personal interests.' " (*Johnson, supra,* at pp. 476–477.)

plaintiffs and defendants, and defendants have not submitted evidence that "conclusively" negates the possibility of such a relationship.[14]

[14] Defendants also argue that *Sprengel* should not be followed, asserting the *Sprengel* court "took a novel approach in disregarding the attorney's denial of an attorney-client relationship by reasoning that the existence of an attorney-client relationship 'relates to the merits of [the] claims and is therefore not relevant to [the] first prong analysis,' " and claiming the "court did not cite to any precedent for its dicta." Defendants' argument is unpersuasive. First, the *Sprengel* court correctly cited *Castleman, supra,* 216 Cal.App.4th at page 493, for the proposition that the veracity of the plaintiff's allegations is not considered in the first step of the anti-SLAPP analysis, and *Freeman, supra,* 154 Cal.App.4th at page 733, and *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1388, for the proposition that merits-based arguments have no place in the first step of the anti-SLAPP analysis. (*Sprengel, supra,* 241 Cal.App.4th at p. 156.) Second, we agree with *Sprengel*'s analysis regardless of whether it is characterized as dictum. The first step of the anti-SLAPP analysis focuses on whether the conduct *alleged* by the plaintiff is protected activity, not whether the allegations are true. (*Castleman, supra,* at pp. 491, 493.) Thus, the *Sprengel* court properly considered what the plaintiff alleged, not whether she could prove her allegations, in its first-step analysis. We note that defendants cite no case in which the court considered the truth or falsity of the plaintiff's allegations in deciding whether the conduct alleged arose from protected activity.

Finally, we reject defendants' claim that *Sprengel* "defied *Flatley*." In *Flatley, supra,* 39 Cal.4th at page 320, the California Supreme Court held that when a defendant files an anti-SLAPP motion, but "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." Defendants argue that *Flatley* means that, in *Sprengel*, the plaintiff should have had the *initial burden* to conclusively negate the existence of an attorney-client relationship at the time of the alleged wrongdoing. Defendants misunderstand *Flatley*. There, the court concluded the defendant failed to meet *his* initial burden of showing that the plaintiff's claims arose from protected activity because the evidence conclusively established that the defendant's underlying conduct was criminal extortion as a matter of law and such conduct could not constitute protected activity. (See *id.* at pp. 305, 317.) The *Flatley* court continued, "In reaching this conclusion, we emphasize that the question of whether the defendant's underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law—either through defendant's concession or by uncontroverted and conclusive evidence—is not the same showing as the plaintiff's second prong showing of probability of prevailing." (*Id.* at p. 320.) The upshot of *Flatley* is that the

In any event, even if there were no ongoing attorney-client relationship between Todd and defendants, defendants concede that Todd was Wendel Rosen's client at one time. We have seen that attorneys' alleged breaches of duties owed to *former* clients do not constitute protected petitioning activities subject to anti-SLAPP motions. (E.g., *Benasra*, *supra*, 123 Cal.App.4th at p. 1182 [plaintiffs sued their former law firm for breaching the duties of loyalty and confidentiality in representing an adversary in an arbitration; defendant law firm presented evidence it no longer represented the plaintiffs at the time of arbitration]; *Castleman*, *supra*, 216 Cal.App.4th at pp. 485–487 [plaintiffs sued an attorney who allegedly breached his duty of confidentiality to the plaintiffs *after* the attorney left the law firm that represented the plaintiffs].) *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617 (*U.S. Fire*) provides another example. In *U.S. Fire*, an insurance company sued to enjoin a law firm from representing a group of asbestos creditors on the ground the law firm had previously represented the insurance company in asbestos-related litigation. (*Id*. at pp. 1619–1620.) The law firm responded by filing an anti-SLAPP motion, but the Court of Appeal concluded the insurance company's allegations did not involve protected activity under the anti-SLAPP statute. (*Id*. at p. 1639.) The court explained the insurance company's claims focused on the attorney-client relationship between itself and the defendant and sought "relief based on a claim of successive representation conflict of interest in violation of rule 3–310(E)," and "the principal thrust of the misconduct averred in the underlying complaint is the acceptance by [the law firm] of representation adverse to [the plaintiff]." (*Id*. at p. 1628.)

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defendant (and moving party) fails to meet the initial burden of showing the underlying conduct arose from protected activity if the defendant concedes the issue or the evidence conclusively proves the underlying conduct is *not* protected. But *Flatley* did not purport to alter the two steps of the anti-SLAPP analysis described in *Equilon*, *supra*, 29 Cal.4th at page 67. The burden does not shift to the plaintiff to demonstrate a probability of prevailing until the second step of the analysis.

Despite these examples, defendants argue plaintiffs' claims "as a former client satisfy" the first step of the anti-SLAPP analysis.[15] Defendants attempt to distinguish *Castleman* and *U.S. Fire* on the ground the attorneys in those cases took on new clients whose interests were adverse to the plaintiffs. Defendants argue in those cases, "the attorney's mere representation of the other client was the basis for the subject breach of

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[15] Defendants rely on *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 158 (*Thayer*), in which this court observed that *only* claims "brought by former clients against their former attorneys based on the attorneys' acts on behalf of those clients . . . may not be within the ambit of SLAPP." But *Thayer* did not involve a plaintiff suing a former attorney for breach of the duties of loyalty or confidence. Rather, the plaintiff in *Thayer* was a nonclient who argued her claims of breach of fiduciary duty and fraud brought against an attorney were categorically not the proper subjects of an anti-SLAPP motion. (*Id.* at p. 157.) In that context, the court made its observation, citing *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (*PrediWave*). (*Thayer*, *supra*, at p. 158.)

In *PrediWave*, the Sixth District Court of Appeal stated, "In determining the applicability of the anti-SLAPP statute, we think a distinction must be drawn between (1) clients' causes of action against attorneys based upon the attorneys' acts on behalf of those clients, (2) clients' causes of action against attorneys based upon statements or conduct solely on behalf of different clients, and (3) non-clients' causes of action against attorneys. In the first class, the alleged speech and petitioning activity was carried out by attorneys on behalf of the plaintiffs in the lawsuits now being attacked as SLAPPs, although the attorneys may have allegedly acted incompetently or in violation of Professional Rules of Conduct. The causes of action in this first class categorically are not being brought 'primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition.' " (*PrediWave, supra*, 179 Cal.App.4th at p. 1227.) The court distinguished three different types of claims brought against attorneys and held that the first type of claim was not subject to an anti-SLAPP motion. But the *PrediWave* court did not hold that the other two types of claims were categorically subject to anti-SLAPP motions as those types of claims were not before it. Likewise, we do not read *Thayer* as holding that the second type of claim (clients' causes of action against attorneys based upon statements or conduct solely on behalf of different clients) is categorically subject to anti-SLAPP motions because that type of claim was not before the court. (See *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66 [" 'language contained in a judicial opinion is " 'to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered' " ' "]; *Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006 ["Mere observations by an appellate court are dicta and not precedent, unless a statement of law was 'necessary to the decision, and therefore binding precedent.' "].)

fiduciary duty, [but] Respondent cannot credib[ly] make any such allegation here." Yet, plaintiffs have alleged defendants' new client McDonnell "became increasingly adverse to Todd" and, further, Wendel Rosen took actions adverse to Todd and disclosed confidential information. Whether plaintiffs made this allegation "credibly" is not relevant at the first step of the anti-SLAPP analysis because, as we have explained, we do not consider the veracity of a plaintiff's allegations in determining whether the allegations arise from protected petitioning activity. (*Castleman, supra,* 216 Cal.App.4th at p. 493.)

Perhaps a closer case to plaintiffs' under the facts is *Freeman*. In that case, the attorney Schack did not undertake to represent the plaintiffs' opposing party in litigation; rather, he took as a client a plaintiff-in-intervention in an antitrust lawsuit in which the *Freeman* plaintiffs had been the original plaintiffs and Schack had been hired to represent them. (*Freeman, supra,* 154 Cal.App.4th at p. 724.) The plaintiffs alleged they later discovered that the new client's interests were adverse to theirs. Among their claims, the plaintiffs argued, "Schack's actions violated rule 3–310(E) of the Rules of Professional Conduct, which prohibits consecutive representations adverse to a former client." (*Id*. at p. 728.) The court concluded the plaintiffs' allegations did not arise from protected activity, but in Schack's alleged "undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them in connection with [the underlying antitrust lawsuit in which Schack represented the plaintiffs]." (*Id*. at p. 732.)

Similarly, in the present case, the principal thrust of plaintiffs' allegations is that defendants undertook to represent McDonnell, the Replacement Trustee, whose interests were adverse to Todd, thereby violating the duty of loyalty defendants owed Todd as a former client. As in *Freeman*, defendants here have failed at the first step of the anti-SLAPP analysis because plaintiffs' allegations did not arise from protected litigation activity. Thus, even if Todd was only a former client of defendants at the time of the alleged breaches of duty (and not a current client as alleged), defendants' anti-SLAPP motion would fail.

Finally, we reject defendants' argument that the trial court erred in referring to Jarvis LP in its decision because Jarvis LP is not a named party in the FAC. "[A]ppellate review is not concerned with the trial court's reasoning but only with whether the result was correct or incorrect." (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 843; see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 ["we cannot undo the effect of the ruling or the ensuing judgment on the ground that the court may have misapplied [a statute] as long as any other correct legal reason exists to sustain either act"].) To the extent defendants' argument is simply that Jarvis LP was not properly named as a plaintiff in the FAC, an anti-SLAPP motion is not the appropriate vehicle to raise this issue. (See *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851, fn. 12 ["An anti-SLAPP suit motion is not a substitute for a demurrer or summary judgment motion."]; *Yeager*, *supra*, 23 Cal.App.5th at p. 461.)

DISPOSITION

The order denying defendants' anti-SLAPP motion is affirmed.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A151981, *Jarvis v. Wendel, Rosen, Black & Dean, LLP, et al.*